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No. 92-1253

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

Petitioners,

against

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondents.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

THE CITY OF NEW YORK,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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(9607—LC9-298—1993)

QUESTIONS PRESENTED FOR REVIEW

Respondent, Brooklyn Navy Yard Development Corporation, maintains that the underlying proceedings do not present any issues for resolution by this Court. Moreover, and in any event, even if this Court was disposed to grant the writ of certiorari, the decision of the New York State Supreme Court, Appellate Division, First Department would have to be affirmed, as fully consistent with the decisions of this Court.

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STATUTE:

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No. 92-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

Petitioners,

against

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondents.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

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COASTAL DRY DOCK & REPAIR CORP.,

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THE CITY OF NEW YORK,

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against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Brief in Opposition to Petition for a Writ of Certiorari to the New York State Supreme Court, Appellate Division, First Department

Opinions and Judgments Below

The opinions below have been accurately reproduced in petitioner's petition for a writ of certiorari.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes

The statutes involved in this matter are accurately reproduced and set forth at pages 34a-39a of the Appendix annexed to the petitioner's petition for a writ of certiorari. There are no constitutional issues involved in this case.

Counter Statement of the Case

Petitioner's account of the facts of this case, so far as recited, is substantially correct. However, this respondent draws this Court's attention to the following additional matters which are not set forth with sufficient particularity, or clarity, in the petitioner's statement of facts. The assertion by the petitioners at pages 3 and 4 of the petition to the effect that the petitioners were "all land-based dry dock workers" is, of course, a self-serving declaration in the context of this case, involving a graven dry dock. The scaffold upon which the men were standing at the time of

the accident rested on the bottom of the dry dock (296).[1] At the time of the occurrence, they were actually engaged in the performance of repair work on the U.S.S. Stump (294). The ship was resting on the bottom of the dry dock and the dry docking procedure was described to the jury as involving a boat being brought into an area where there was water (295). After the boat was brought into the area, the water was actually drained out so that the boat comes down and ultimately rests on large wooden devices or docks. At that time, it is possible to walk around on the floor of the dry dock bottom, or pit, underneath the boat, from which the water had been artificially removed, in order to perform repair services and to permit access to portions of the boat which would ordinarily be under the water line (295).

There were erected certain scaffolds standing on the very bottom of the dry dock to permit access by the workmen to various portions of the ship, which would normally be under water, which scaffolds were approximately 30 to 35 feet in height, above the bottom of the dry dock or pit (296). At that time, the job of the plaintiffs was to remove a large piece of metal from the rear of the vessel called "a shaft bearing" (296). It was explained to the jury that a portion of the propeller shaft protrudes from the rear of the vessel and that there is a bracket coming down from above, one end of which is attached to the rear of the vessel and the other end of which is attached to the propeller shaft (296). The shaft itself runs through that bracket, holding it in place. The shaft runs through a metal part in the bracket called a "shaft bearing". The work of the men involved the removal of the large piece of metal, the "shaft bearing," from the vessel (296). The "shaft bearing" is several feet long, is made out

[1]References in parentheses are to appropriate pages in the Record on Appeal filed in the New York Supreme Court, Appellate Division.

of very heavy steel and metal and weighs many thousands of pounds (297). It is furthermore set forth to the jury that in order to lift the subject "shaft bearing" out and up, there was need to utilize a crane, which was parked over and on the side of the dry dock, outside of the dry dock itself (297). There were lines running down from the crane to the area where the "shaft bearing" was being pulled out by the crane (297). The accident in question allegedly happened when the "shaft bearing" being removed allegedly struck the top of the scaffold, with the result that the appellants were allegedly thrown therefrom, falling to the bottom of the dry dock (298-301).

One of the respondents, Rene Jeantine, testified that he was standing on the scaffold while moving the "shaft bearing" (388). In order to move it, according to the witness, it had to be lifted off from the shaft to make it clear of the shaft. When it was, in fact, clear of the shaft, then the crane would be in a position to pull it out (388). He described the scaffold that he was standing on as being a pipe scaffold approximately 25 to 30 feet in height (389). He further testified (392):

> Q. Now, you are standing, at the time this occurred, under the stern of the ship, correct? The back of the ship?
>
> A. Yes.
>
> Q. And the propeller shaft is coming down at that point?
>
> A. Yes.
>
> Q. Were the propellers off at this time?
>
> A. Yes, the propeller already off.

> Q. If the ship, the stern of the ship, is up here, correct; the scaffold would be under the stern of the ship?
>
> A. Yes.

He described the function of the crane and stated that one of his co-workers was on the upper portion of the dry dock in order to coordinate his activities, in the dry dock itself, with those of the crane operator on the upper and outer portion of the dry dock (403-404).

He also testified that the crane operator was outside of the pit, when the work was being performed in the bottom of the pit (404).

He also described the accident itself involving the "shaft bearing" hitting the scaffold with the ensuing consequences (416-418).

The location of the accident itself was identified as being Dry Dock #6 by another witness, Theodore Hansen (331). He testified that when he passed upon the upper and outer portion of the dry dock that it was possible, by looking down, to visualize the workmen working on the scaffolding below at the stern of the vessel (369). He stated that, at the time in question, the supervision of the workers was by a Coastal employee, known as Oscar (378) and he confirmed the nature of the work in which the appellants were involved at the time of the alleged occurrence (379).

The foregoing reflects that the incident giving rise to this lawsuit, and ultimately to this petition for a writ of certiorari, arose out of, was inextricably connected to and occurred in the course of ship repair operations in a dry

dock which have historically *always* been held to be within the ambit of admiralty jurisdiction by this Court and by the Court of Appeals of the State of New York.

It is furthermore to be noted that the petitioners concede that they would not be entitled to any recovery whatsoever under the application of admiralty law, which we submit is applicable herein (Petit. p. 8).

REASONS FOR DENYING THE WRIT

POINT I

None of the considerations governing this Court's review of a petition for writ of certiorari are present here.

The only possible predicate for the exercise of this Court's jurisdiction in issuing a writ of certiorari in this case is under its rules, at Part III, Rule 10.1(c).

That rule sets forth, in substance, that when a state court, or United States Court of Appeals, has decided an *important* question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court, that this Court may take such into consideration in granting a writ of certiorari.

That rule in no way entitles the respondents to the consideration of this Court. There is no doubt that the Appellate Division of the First Department, to which this petition for a writ of certiorari is directed, is a State Court which has

decided a question of federal law. However, as will be made more fully apparent at Point II *infra*, the issue of the applicability of maritime law to the presented circumstances does not constitute "an important question of federal law which has not been, but should be, settled by this Court," within the meaning of Rule 10.1(c). This for the simple but eloquent reason that no issue is raised by the instant petition, which has not been settled by this Court. It follows, *a fortiori*, that this matter does not present an instance of a federal question having been decided by the Appellate Division "in a way that conflicts with applicable decisions of this Court," under Rule 10.1(c). Nothing could be further from the truth, as will be more fully shown at Point II *infra*. The decision of the Appellate Division, predicated as it was on the decision of the Court of Appeals of New York in the case of *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235 (1925), was and remains fully consistent with the decisions of this Court. There is no conflict whatsoever between those decisions and decisions of this Court. On the contrary, it will be shown that those decisions are fully, completely and irrevocably consistent therewith. The instant petition should, accordingly, be denied.

POINT II

There is no purpose to the granting of the writ of certiorari, since the decision of the New York State Supreme Court, Appellate Division, First Department would be affirmed, as fully consistent with the decisions of this Court.

The sole issue presented is the continued viability, under the decisions of this Court, of the decision of the New York

Court of Appeals in the *Butler v. Robins Dry Dock & Repair Co.* case, *supra,* relied upon by the Appellate Division. Although not, of course, binding on this Court, it is surely worthy of *some* consideration that the Appellate Division held that the *Butler* decision, *supra,* was fully consistent with the decisions of this Court. See page 20a of Appendix B to this petition. It is, of course, conceded by the petitioners that the *Butler* decision governs this case, if consistent with the decisions of this Court. In *Butler,* it was held that a dry dock was within admiralty jurisdiction. The denial of petitioners' motion for leave to appeal to the Court of Appeals, interposed to the Appellate Division, as well as the denial of a similar motion to the Court of Appeals, reflects that both such courts assumed the continued viability of the *Butler* decision, under the decisions of this Court.

The decision in the *Butler* case is, indeed, fully consistent with the decisions of this Court.

Repair of a vessel in a graven dry dock was within the ambit of admiralty jurisdiction under the decisions of this Court, prior to and subsequent to the decision of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed.2d 454 (1972). See, *Sisson v. Ruby,* 497 U.S. 358, 110 S. Ct. 2892, 111 L.Ed.2d 292 (1990), and particularly n. 4.

In *Butler,* the Court of Appeals of this State, relying upon decisions of this Court, held that a tort occurring upon a vessel in a dry dock, identical to that presented in this case, from which all navigable waters had been withdrawn, was within admiralty jurisdiction and stated, in pertinent part, as follows (240 N.Y. 26):

> "We think that for the purposes of disposition of such a question as this, and also somewhat as a matter of policy lest admiralty law otherwise be robbed too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters even though the water has been temporarily withdrawn. The Robert W. Parsons, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73; The Steamship Jefferson, 215 U.S. 130, 30 S.Ct. 54, 54 L.Ed. 125, 17 Ann. Cas. 907; *So Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918 C, 451, Ann. Cas. 1917 E 900. See also, Anglo-Patagonian, 235 F. 92, 148 C.C.A. 586; *Brandeis Case,* 248 Mass. 31, 142 N.E. 844."

In *Butler,* as in this case, the accident in question occurred, not while the person involved *was in the vessel, or on the vessel,* but while he was under the bulge of the upper part of the vessel and while working in the bottom of the dry dock area, when a plate from the side of the vessel dropped upon him and caused his death. In applying admiralty law, the Court held, as urged by this respondent below, that the exact placement, or location, of the injured party in the dry dock is of no consequence, since it is the operation of the dry dock itself, with all of its appurtenances, which affords the predicate for the application of maritime law. As such, it is completely irrelevant, as urged by this respondent below, and as determined in *Butler,* whether the individual injured was *on the vessel, in the vessel, or adjacent thereto,* the determinative consideration being whether he was engaged in the type of work for which the vessel was placed in dry dock. As stated in the *Butler* case, *supra,* in such regard (240 N.Y. 27):

> "Moreover, if for the purpose of the determination of the question now presented to us a ship is to be regarded as still in navigable water when it has been floated into and rests upon the dry bottom of such a dock as this, it must be because such dock is to be regarded as navigable water instead of land, and if that is so the intestate constructively was standing in navigable waters at the time when the plate fell and caused his death."

The decision in the *Butler* case was fully consistent with the decisions of this Court. See, e.g., *Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed. 228 (1924); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 43 S.Ct. 418, 67 L.Ed. 756 (1923); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 45 S.Ct. 157, 69 L.Ed. 372 (1925).

Furthermore, and in any event, historically a second, and completely independent, predicate for the application of admiralty jurisdiction exists in this matter in that it is not open to question that a contract for the repair of a vessel, as distinguished from one for its construction, is and has always been construed as a maritime contract by this Court and by the New York State Court of Appeals, applying the decisions of this Court. See *Danielsen v. Morse Dry Dock & Repair Company*, 235 N.Y. 439, 139 N.E. 567 (1923). In *Danielsen*, Judge Cardozo held that a vessel undergoing repairs in dry dock was within admiralty jurisdiction. The plaintiff in that case was employed by the defendant as a burner and was sent aboard the vessel to burn the bolts and metal plates. While so engaged, he suffered injuries due to the defendant's negligence. In upholding the applicability of maritime jurisdiction, Judge Cardozo pointed out that the

contract for the repair of the ship, as distinguished from one for its construction, is a maritime contract. He added (235 N.Y. 442, 139 N.E. 568):

> "The jurisdiction of admiralty over contracts is governed by the nature of the transaction. The jurisdiction of admiralty over torts is governed by locality (*Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476; *State Industrial Comm. v. Nordenholt*, 259 U.S. 567). This action being in tort, the plaintiff brings his case within the maritime law if he satisfies one of the two tests of jurisdiction, the test of locality. He goes farther, however, and satisfies them both. A contract for the repair of a ship, as distinguished from one for its construction, is a maritime contract (*The Robert W. Parsons*, 191 U.S. 17; *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242). A vessel in a dry dock, which is afloat in navigable waters, is itself in those waters as truly as if moored to a wharf or beside a pier (*The Jefferson*, 215 U.S. 130, 142, 143; *The Robert W. Parsons*, 191 U.S. 17, 33; *The Anglo-Patagonian*, 235 Fed. Rep. 92). There is a concurrence of the two elements of maritime jurisdiction. A workmen's compensation statute, not founded upon consent, but acting *in invitum*, will not displace the rights and remedies established by the law of the sea (*Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *State Industrial Commission v. Nordenholdt, supra; Matter of Red Cross Line v. Atlantic Fruit Co.*, 233 N.Y. 373).

See also, *North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Company*, 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed. 510 (1919).

Up to the decision of this Court in the case of *Executive Jet, supra*, no issue whatsoever *could*, or *would*, possibly have been raised that the accident in this case was not within the proper scope of admiralty jurisdiction.

However, following that decision, as noted above, a certain element of confusion was engendered among the various United States Courts of Appeal regarding the scope thereof, which confusion has now been totally eliminated by this Court's decisions in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982) and *Sisson v. Ruby, supra*. In *Sisson*, this Court extensively discussed its prior decisions in the *Richardson v. Foremost* and *Executive Jet* cases. It is quite clear that, as enunciated by this Court in *Sisson*, there was never any intention by it to exclude from admiralty jurisdiction those matters which had traditionally come within the scope of admiralty jurisdiction. In *Sisson*, this Court held that the two predicates for admiralty jurisdiction were that the incident must bear a significant relationship to maritime commerce and must be such as to arise from traditional maritime activities.

It cannot be gainsaid that injury of the type involved in this case, in the course of ship repair, by men working on a scaffold in a graven dry dock bears a significant relationship to maritime commerce, thus satisfying the first prong of that test.

In *Sisson, supra,* this Court stated (110 S. Ct. 2896, n.2):

> "In *Foremost,* the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction."

This first aspect of the test is thus complied with, in that ship repairs to a completed vessel, as distinguished from one under construction (see *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 42 S. Ct. 157 [1922], distinguished by Judge Cardozo in *Danielson, supra,* 235 N.Y. 442-443, 139 N.E. 568-569) is not of mere local concern, but had,

> "direct relation to navigation and commerce".

Robins Dry Dock & Repair Co., supra, 266 U.S. 457, 45 S. Ct. 158. See also, decision of the Appellate Division in this case (Appendix B, p. 22a) and *Great Lakes Dredge & Dock Co., supra.*

The second prong is similarly complied with. Thus, under this Court's formulation in *Sisson,* the determination as to whether an incident arose from traditional maritime activity requires a definition of the "relevant activity," which:

> ". . . is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."

Sisson, supra, 110 S. Ct. at 2897.

As noted by this Court, in *Sisson*, the airplane in *Executive Jet*, although landing in Lake Erie, failed this test for admiralty jurisdiction precisely because the "relevant activity" was not the plane sinking in Lake Erie, but air travel generally, which was never, historically or traditionally, encompassed within admiralty jurisdiction. The *fortuitous* circumstance of the plane landing on, or in, Lake Erie, as opposed to its impacting upon land, was not sufficient for the invocation of admiralty jurisdiction.

In this case, on the other hand, the "relevant activity" is ship repair, which has always, historically and traditionally, come within admiralty jurisdiction.

The second prong of the test is, accordingly, met.

These conclusions are buttressed by this Court's comments at pages 2897 and 2898 of its decision in *Sisson, supra*, to the effect that navigation was not the only activity that was sufficient to confer admiralty jurisdiction under the *Executive Jet* and *Sisson* tests. This Court stated (110 S. Ct. 2898):

> "The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial".

This conclusion applies to the type of maritime activities involved in this lawsuit as well.

As furthermore noted by this Court in the *Sisson* case, which comments are particularly applicable in this case (110 S. Ct. 2898):

> "Clearly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity' *given the broad perspective demanded by the second aspect of the test.*" (Emphasis supplied)

To paraphrase the above-quoted comment of this Court:

> "Clearly, the repair of a vessel in a graven dry dock is substantially related to 'traditional maritime activity' given the broad perspective demanded by the second aspect of the test."

See, also, *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 110 S. Ct. 3266, 111 L.E.2d 776 (1990) wherein this Court vacated the judgment of the Texas Court of Appeals, Ninth District and remanded the case to that Court for further consideration in light of this Court's prior decision in *Sisson v. Ruby, supra*, and *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 114 L.Ed.2d 649 (1991), citing with approval the case of *North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Co., supra*, at 111 S. Ct. 2076.

Beyond these reasons for denying petitioners' writ there remains the historic, and still highly relevant, demarcation of federal maritime jurisdiction as inclusive of "all areas within the ebb and flow of the tide, regardless of whether those areas are actually covered by water at the time of the

alleged event." *See, Hassinger v. Tideline Electric Membership Corp.*, 781 F.2d 1022, 1026, *cert. denied*, 478 U.S. 1004 (1986); *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

The "mean high water mark" [*Leslie Salt Co., supra*, 578 F.2d at 750] is generally considered to be "the line to which high water ordinarily reaches." *U.S. v. Harrell*, 926 F.2d 1036, 1042 (11th Cir. 1991). Accordingly, as overwhelmingly held by virtually all federal courts, incidents occurring seaward of the mean high water mark, as here, take place in navigable waters and are fully encompassed within federal maritime jurisdiction. *See, Hassinger v. Tideland Electric, supra; Leslie Salt Co., supra; Boudreau v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), *cert denied*, 459 U.S. 1170 (1983); *U.S. v. 119.67 Acres of Land*, 663 F.2d 1328, 1334 (5th Cir. 1981); *Gahagan Const. Corp. v. Aramo*, 165 F.2d 301, 303 (1st Cir.), *cert denied*, 333 U.S. 876 (1948); *U.S. v. Sasser*, 738 F.Supp. 177, 179 (D.S.C. 1990).

Petitioners' reliance on the "gangplank" rule is to no avail. In view of the undisputed facts of this case, a gangplank was neither in use nor contemplated. *See, Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917).

Thus, from the perspective of established rules of law, petitioners, at the time of their accident, were not only in, but *under*, navigable waters, and certainly within maritime jurisdiction.

Conclusion

Upon the facts and the law of this case, there is no basis for review thereof by the Supreme Court of the United States and the petition for a writ of certiorari should, accordingly, be denied.

Respectfully submitted,

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